

# Federal Docket Management System Guidelines for Agency Users

## ***Docket Processing Special Circumstances***

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## **Description**

Since the inception of the Federal Docket Management System (FDMS), the Federal partners have identified special circumstances that may arise in dealing with the receipt of electronic comments. This document is to provide guidance, or suggested best methods, for handling certain types of information or circumstances such as receiving a submission via FDMS that contains personal or confidential information.

Materials may be docketed in various ways:

- Publicly available in electronic form,
- Publicly available in paper or other non-electronic form either for legal reasons (e.g., copyrighted material) or technical/feasibility reasons (e.g., physical objects, videos, CDs, oversized materials, databases, high-volume mass mailings), or
- Restricted access in either electronic or non-electronic form (e.g. copyright or confidential business information).

Whether an agency chooses to use the FDMS Docket Center or manage its own docket, similar issues are bound to arise. Thus, the information in this document has been developed by a cross-agency workgroup of lawyers in a collaborative effort to assist agencies that may be dealing with these electronic docket issues for the first time.

### **List of Special Circumstances covered in this document:**

1. Handling Requests from Agencies to Remove or Update Background and Supporting Materials
2. Handling Duplicate Comment Submissions by the Same Commentor
3. Handling Requests from the Public to Redact or Remove Comments
4. Handling Obscene or Threatening Public Comments
5. Handling Irrelevant or Inappropriate Comments
6. Processing of Mass Mail Comments
7. Receipt of Intra-agency “Comments”
8. Handling of Copyrighted Information
9. Handling Personal Privacy, Confidential Commercial, and Similar Types of Information

### **General Docket Center Staff Responsibilities**

For agencies that publish regulations, their docket staff and sometimes designated employees, hold primary responsibility for creating, maintaining, updating, and assuring the quality of the images and metadata for the dockets. In this role, docket staff may be faced with situations that require decisions on procedural or policy issues. Since contractors can neither establish Agency

policy nor circumvent existing policy, an Agency representative must determine the proper course of action.

In General, all public comments become part of the official docket file and should generally be posted to FDMS. The exceptions are determined by the agency and may include comments containing copyrighted material, confidential information or other information whose disclosure is restricted by statute and materials that cannot be physically posted. When docket staff come across a special circumstance, they should forward it through their chain of command to the designated agency contact for review. If it is an unique circumstance or issue, and the process for handling it has not been addressed by agency Standard Operating Procedures (SOPs), the agency contact should review the material or information and forward it to the appropriate Office of General Counsel and/or agency program contacts for review to best determine the desired outcome and implementation of a new procedure. It then becomes the responsibility of contract staff to follow the agency's policies and procedures.

## **1. Handling Requests from Agencies to Remove or Update Background and Supporting Materials**

It has been determined that once a background or supporting document has been added to a published electronic docket file, it generally should remain in place for future audit purposes. As a result of this policy, it is important that reg-writers and points of contact verify the accuracy of all materials before submitting them to the docket office for inclusion in the docket file or system. However, there may be occasions when it is appropriate to remove documents from the electronic docket. Once the docket has been posted for public viewing, materials should not be retracted without the approval of the designated agency contact.

In the case where a newer version of a document becomes available after publication, the older version should generally remain in the system without modification. In the Document Description Field for the older version, agency staff or contractors can place a cross-reference to the newer document stating "Related to Document XXXX-XXXX-XXXX-XXXX." If the older version remains in the system, agency staff or contractors can use the Related Document field to build a link between the two database records. The updated version should be added as a new record and shall be given a new system identifier. In the Document Description Field of the new version, the following text should be added: "Revised entry. Original document is XXXX-XXXX-XXXX-XXXX." Once again the two database records should be linked using the Related Document field.

## **2. Handling Duplicate Comment Submissions by the Same Commentor**

A member of the public may submit the same comment twice either by accident, through technical error, or by submitting the comment through multiple delivery means. With non-electronic docket systems, the only means of submission are through hardcopy, fax, and agency staff or contractors are able to weed out duplicate comments. Patrons also benefit from this process. When a comment is submitted using the FDMS electronic comment form, the system automatically assigns the new submission a number without first verifying the existence of a duplicate entry. The FDMS application does not check for duplicate comment submissions. Accordingly the following are suggestions for handling duplicate FDMS comments.

1. If a comment has been assigned a document identification number and is published before it is determined to be a duplicate, then the document identification number and metadata should remain in the system for the duplicate submission. However, the PDF may be deleted. In the Document Description Field, standard text should be included to read: “Duplicate entry. Original comment is entry XXXX-XXXX-XXXX-XXXX.” The submissions should be related using the Related Documents field.
2. Even if the comment has not yet been published, FDMS cannot reassign the Document ID number for the duplicate comment as it is automatically assigned by the system. Therefore, agencies may want to put a “placeholder” to let the public know there is a reason for non-consecutive numeration.

### **3. Handling Requests from the Public to Redact or Remove Comments**

This section covers the following circumstances:

- (a) At the time a comment is submitted, the commenter requests that the comment, or portions of it, should not be made publicly available in electronic form.
- (b) After comment submission, the commenter requests that the comment, or portions of it, should not be made publicly available in electronic form.
- (c) After comment submission, the commenter requests that the comment be removed from the docket.
- (d) After a comment has been made publicly available, a third party requests that the comment, or portions of it, be either removed from the docket or no longer be made publicly available in electronic form.

A comment “not made publicly available in electronic form” might instead be docketed as publicly available but in a non-electronic form or be docketed as restricted-access.

The FDMS is an Internet-accessible application where public comments and agency supporting materials become viewable to the public for consideration during the rule-making process. The nature of this application should be explained in the Federal Register notice issued by the program office. The Federal Register notice should inform the public that comment submissions

will be made available over the Internet and that all submissions become part of the official public record. The FDMS has a user agreement which is located in a link on the homepage as well as the comment page. This user agreement notifies the submitter that comments may be publicly disclosed in a docket or on the Internet.

Despite these warnings, agencies will receive requests to have comments removed from FDMS. These requests may come from the actual comment submitter or from another member of the public. Such requests may state that the submitter has changed their opinion, no longer wishes to have their views made public knowledge, or that another member of the public finds the content of the comment to be offensive in nature.

Since sufficient public notice has been provided, the position of most agencies is that comments should not be retracted for any of the above reasons. However, should an agency docket center receive a new retraction request citing different reasons, the request should be submitted by the docket manager for agency consideration. In addition, the requesting individual should be directed to the contact listed in the notice. It is ultimately up to the agency to determine whether and how to proceed.

#### **4. Handling Obscene or Threatening Public Comments**

Agency staff should determine if an obscene or threatening comment should be available for public viewing or restricted access. Regardless of the outcome, the comment should be indexed in the system and should remain a part of the official docket file. The only variable is if it will be available to the public.

Past instances have included the review of comments which contained exceptionally vulgar language or threats to an agency's employees or contractors or agency facilities. If docket offices identify a comment as fitting one of these categories, the docket manager should submit the comment for initial review by the designated agency contact. If warranted, the agency contact should forward the comment for review by the Office of General Counsel and/or affected Agency program contact. The ultimate decision on posting of these comments to FDMS resides with the agency and their general counsel.

#### **5. Handling Irrelevant or Inappropriate Comments**

While agency staff or contractors have the ability to sort mail and eliminate that which is deemed inappropriate, this activity is not possible in FDMS where the public can directly submit any materials or comments of their choice to a docket file. "Junk mail" submissions, or, submissions deemed irrelevant by an agency, may be those that contain, for example, absolutely no content related to an open agency docket and that fail to request any agency service or action. However,

because the FDMS automatically populates online submissions with an agency docket number and assigns this submission a document identification number, this material has been determined to generally be part of the official docket file under which it was submitted. As a result, agency staff or contractors should publish these submissions according to the normal processing standards unless an agency's SOP specifies another course of action.

## **6. Processing of Mass Mail Comments**

During the comment process, it is not unusual for an association, non-profit, or special interest group to establish a mass mailing campaign within their local communities or professional societies. Mass mailing campaigns can be regional or nationwide and seek to interest the public in the actions being considered by the Agency. To encourage the maximum amount of participation with these campaigns, the organization makes participation as simple as possible. In the past campaigns have relied heavily on the use of inexpensive pre-printed postcards which participants can sign and mail directly to the Agency's docket office. Another popular mechanism has been the use of form letters and petitions which allow participants to simply sign their names when an organizational representative comes to call. The organization then assumes the responsibility of forwarding these letters or petitions directly to the docket office. These campaigns are commonly referred to as "mass mailings" partly because the postcards, letters, and other documents used are identical in content and designed to promote easy, rapid, large scale mailings.

While identical comments do provide a clean, concise message to the agency, they present a unique challenge to a docket center's staff. Comments, whether unique or identical in content, all become part of the official docket file. The challenge exists with the administration of FDMS. The system was designed to allow the public to submit their own comments directly into an electronic docket file and to provide rapid search and retrieval functions during the reference process. As organizations become more technologically sophisticated, mass mailing campaigns are abandoning the use of traditional mass mail techniques, such as postcards and letters, in favor of "mass mail" email messages and electronic docket system submissions. As a result, the procedures established by an agency to handle the more traditional mass mail campaigns must be adapted to work in the automated system. To ensure uniform handling of these situations, this guidance addresses both traditional and non-traditional mass mail campaigns that result in the submission of identical or similar comments.

Increasingly common, are the mass-mailing forms that are being submitted with a text box where a submitter can write original text. The receiving agency may develop criteria for determining what is identical and what is similar and decide on a procedure for handling each. Under FDMS, all comments from a mass mailing can be input and posted, or, a sample copy can be input and posted with reference to others.

## **A. Identifying a Campaign**

Rarely is the docket office informed by an organization that a mass mailing campaign has begun. As a result, the docket office typically receives and processes several of the comments before a trend is spotted and the campaign identified. One clue for identifying a campaign is that comments include the same subject line or title in their 7 email messages or FDMS entries. Another clue is that most traditional campaigns use a seal, logo, or other graphic to set their campaign apart from others.

## **B. Creating the Campaign in FDMS**

Once a campaign has been identified, it should receive a name based either on the subject or title of the message or the name of the sponsoring organization. The preference is to name the campaign after the sponsoring organization whenever possible. Assuming that at least one comment for the campaign has already been published in FDMS, the docket office can use the latest identical comment entry to designate the start of the campaign in the automated system. All previous campaign entries can be linked to the campaign record using the Related Documents field in FDMS.

In other words if there are three substantively identical comments for a mass mailing campaign already in FDMS< then the third comment would mark the start of the campaign. The title of the third comment may be changed to the name of the campaign. The Document Description field should reflect the appropriate metadata including a running total of comments received to date for this campaign.. After converting this third comment, no further identical comments for this campaign should be entered into the FDMS unless submitted directly by the public in which case these comments would be linked to the campaign using the Related Document field.

If there is not already an example in the docket, then a single entry can be entered for the campaign and may contain a sample PDF.

## **C. Organizing Campaign Comments**

Once a campaign has been identified, tracking and organizing of comments is up to the agency, and it becomes critical, especially as the number of identical comments increases. For example, as of the publication date of this document, one agency had received several hundred thousand comments on a proposed rulemaking.

Incoming comments should be reviewed daily to determine whether they are part of a recognized mass mailing campaign. Hardcopy comments should be sorted into stacks

based on the campaign they belong to and within those stacks organized by postmark date. While unlikely, it is possible that two campaigns would bear the same subject line but entirely different bodies of text. Printing out or reading messages ensures closer review and allows agency staff or contractors to transfer messages to the proper campaign folder.

At the end of the day, the docket office should determine the total number of identical comments received for the day for each campaign. The total can be entered into the Document Description field of the sample comment in FDMS.

Where there are multiple campaigns, the docket office may utilize tracking methods such as spreadsheets or databases to stay current and organized during the processing of large volumes of mass mails.

#### **D. Closing the Comment Period for Mass Mailings**

The organizing and totaling of mass comments typically continues through the close of the comment period. The running total for each campaign is updated daily until the end of the comment period. Depending on the volume of comments received for each campaign, agency staff or contractors may require several days or even weeks to complete this process. The Agency should be actively involved in designating completion times in the cases of extremely large mass mail campaigns.

Late comments can be defined as those postmarked or with system dates falling after midnight of the closing date for the comment period or other time designated by the agency. Whether a docket office processes and tabulates late comments, including mass mailing campaigns, is dependent on the direction received by the agency's policy and amount of resources required to perform this service.

If late comments are received for a mass mail campaign and agency staff or contractors are directed to process them, metadata may be added to the Document Description field listing the total number of late comments received for the campaign.

### **7. Receipt of Intra-agency "Comments"**

An intra-agency "comment" is one that is submitted by an employee or contractor of the agency that created the docket, or by a component of that agency, acting in their official capacity. One aid in determining whether a submission is an intra-agency "comment" is whether there is any identifying information that links the submission to the agency. These submissions are typically considered internal deliberative materials and are not public comments in the strictest sense.



Unless agency policy directs otherwise, or a document submitted by another Agency states that it is a comment for the public record, all submissions made by agency employees or contractors in their official capacity should be directed to the regulation writer or point of contact and not to the docket office. Such comments should not be submitted through FDMS or through any other formal commenting method.

Agency staff or contractors should identify these materials and forward them to the Reg-Writer immediately. No copy should be retained in the docket office. If received through FDMS, the Reg-Writer should be directed to review, print or download the text and PDF (where available) and to notify the docket office that it is safe to delete the metadata and PDF. Since the document identification number cannot be re-used for direct online submissions, the Document Title and Document Description Fields should be altered to read that “This document number was issued in error.”

## **8. Handling of Copyrighted Information**

If FDMS staff or contractors determine that a comment contains copyrighted information, the comment should be directed to the designated agency contact. The agency should direct how the copyrighted information is docketed -- as publicly available in electronic form, as publicly available in non-electronic form, or as restricted-access. If an agency chooses, it can also redact this type of material from the body of the comment and post the redacted electronic copy of the comment in FDMS. The full comment should be placed in either the paper public docket or a confidential docket, depending on agency policy.

## **9. Handling Personal Privacy, Confidential Commercial, and Similar Types of Information**

If an agency chooses, it can redact this type of material from the body of the comment and post the redacted electronic copy of the comment in FDMS. The full comment should be placed in either a paper public docket or confidential docket. If an agency chooses not to redact the comment, it would be more difficult to argue that the entire comment should be placed in a confidential docket, because only part of the comment would contain confidential material.

## **LEGAL EFFECT**

This document is intended to improve the internal management of the executive branch and is not intended to, and does not create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its agencies or other entities, its officers or employees, or any other person.

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